

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ELIZABETH MARGRABE,

Plaintiff,

-against-

SEXTER & WARMFLASH, P.C., DAVID
WARMFLASH and MICHAEL PRESENT,

Defendants.
-----X

Case No.: 07 CV 2798
(KMK) (GAY)

**NOTICE OF MOTION
TO DISMISS**

PLEASE TAKE NOTICE that by leave of the Court and upon the attached Affidavit of A. Michael Furman, Esq., sworn to on the 26th day of October 2007, the exhibits annexed thereto, the accompanying Memorandum of Law, and all other pleadings and proceedings herein, defendants SEXTER & WARMFLASH, P.C., DAVID WARMFLASH and MICHAEL PRESENT by their attorneys KAUFMAN BORGEEST & RYAN LLP will move this Court before the Honorable Magistrate Judge George A. Yanthis at the United States Courthouse for the Southern District of New York, 300 Quarropas Street, Room 118, White Plains, New York, on a date to be set by the Court for an Order dismissing plaintiff's Complaint on the ground that the Complaint fails to state a claim upon which relief can be granted since: (1) *res judicata* and collateral estoppel bars plaintiff's claims; (2) the statute of limitations bars plaintiff's claims; and (3) plaintiff's Complaint fails to state a cognizable cause of action as a matter of law.

PLEASE TAKE FURTHER NOTICE that pursuant to Southern District Local Rule 6.1(b)(2) any opposing papers must be served within ten business days after the service of these moving papers.

Dated: New York, New York
October 26, 2007

Respectfully submitted,

KAUFMAN BORGEEST & RYAN LLP

By:



A. Michael Furman, Esq.
Andrew R. Jones, Esq.
Attorneys for Defendants
SEXTER & WARMFLASH, P.C., DAVID
WARMFLASH and MICHAEL PRESENT
99 Park Avenue, 19th Floor
New York, New York 10016
Telephone No. (212) 980-9600

To: Via ECF & First Class Mail:
William Greenberg, Esq.
Greenberg & Massarelli, LLP
2929 Purchase Street
Purchase, New York 10577

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**AFFIDAVIT OF
A. MICHAEL FURMAN**

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

A. MICHAEL FURMAN, being duly sworn, deposes and says:

1. I am a member of the law firm of Kaufman Borgeest & Ryan LLP, attorneys for defendants Sexter & Warmflash, P.C., David Warmflash and Michael Present (hereinafter "defendants" or "Sexter & Warmflash") in the above-captioned matter, and am fully familiar with the facts and circumstances herein based upon my review of the file maintained by my office. I submit this affidavit in support of defendants' instant motion pursuant to Rule 12(b)(6) Fed.R.Civ.P., seeking an Order dismissing plaintiff's Complaint.

2. A true and correct copy of plaintiff's Complaint in the above-captioned matter is attached hereto as Exhibit "A."

3. A true and correct copy of plaintiff's underlying Complaint - from the action entitled "Elizabeth Margrabe and Anthony Rusciano III, et al. v. Anthony J. Rusciano, II et al.," Supreme Court, Westchester County, Index No. 10032/01 - is attached hereto as Exhibit "B."

4. A true and correct copy of the June 18, 2003 transcript of proceedings from the underlying action is attached hereto as Exhibit "C."

5. A true and correct copy of plaintiff's June 20, 2003 power of attorney appointing William Margrabe to serve as plaintiff's attorney-in-fact is attached hereto as Exhibit "D."

6. A true and correct copy of underlying correspondence *inter alia* between Mr. Margrabe and "co-counsel" is attached hereto as Exhibit "E."

7. A true and correct copy of further underlying correspondence *inter alia* between Mr. Margrabe and "co-counsel" is attached hereto as Exhibit "F."

8. A true and correct copy of the March 17, 2005 Decision and Order of Justice Kornreich (Supreme Court, New York County, Index No. 107569/04) is attached hereto as Exhibit "G."

9. A true and correct copy of a 12-page, single-spaced letter *inter alia* "firing" defendants, sent to defendants on April, 9, 2004, is attached hereto as Exhibit "H."

10. A true and correct copy of defendants' underlying May 14, 2004 Order to Show Cause for an attorney charging lien in the underlying action is attached hereto as Exhibit "I."

11. True and correct copies of plaintiff's June 24, 2004 Memorandum of Law and Affidavits of Harry Lewis, Elizabeth Margrabe, and William Margrabe are attached hereto as Exhibit "J."

12. True and correct copies of plaintiff's June 24, 2004 cross motion and the supporting Affidavit of Harry Lewis are attached hereto as Exhibit "K."

13. A true and correct copy of the September 1, 2004 Decision and Order of Justice Donovan is attached hereto as Exhibit "L."

14. A true and correct copy of the January 4, 2007 Appellate Division, First Department decision of Sexter & Warmflash, P.C. v. Margrabe, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1 Dept., 2007) is attached hereto as Exhibit "M."

15. A true and correct copy of the October 28, 2004 Decision and Order of Justice Donovan is attached hereto as Exhibit "N."

16. True and correct copies of cover pages of the underlying fee hearing transcript of proceedings from December 20, 2004, February 10, 2005, April 1, 2005, and June 1, 2005 are attached hereto as Exhibit "O."

17. A true and correct copy of the underlying July 9, 2007 Decision and Order (Westchester County, Index No. 10032/01) is attached hereto as Exhibit "P."

18. A true and correct copy of the decision of Lipani v. Collins, Collins & Dinardo, P.C., 1992 WL 168267, *3 (S.D.N.Y. 1992) is attached hereto as Exhibit "Q."

Dated: New York, New York
October 26, 2007



A. Michael Furman

Sworn to before me this
24th day of October 2007

Notary Public

HOWARD RUTH EVONI
NOTARY PUBLIC, State of New York
No. 02106078437
Qualified in Bronx County
Commission Expires August 8, 2010

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing: **NOTICE OF MOTION, AFFIDAVIT OF A. MICHAEL FURMAN WITH ACCOMPANYING EXHIBITS MARKED "A" THROUGH "Q"** was served via first class mail and ECF on the 29th day of October 2007 upon:

William Greenberg, Esq.
Greenberg & Massarelli, LLP
2929 Purchase Street
Purchase, New York 10577



A. MICHAEL FURMAN